EDWIN H. RISLEY,
Of Counsel for Defendant in Error,
Utica, N. Y.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 215.

E. BEMENT & SONS,
Plaintiff in Error,

vs.

THE NATIONAL HARROW COMPANY,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR, ON THE GROUND THAT NO FEDERAL QUESTION IS INVOLVED.

STATEMENT.

The record has been printed and served.

The decision and remittitur of the New York Court of Appeals will be found in the record at pages 1 and 2.

The judgment and decision of the New York Court of Appeals was by an order of the Supreme Court made its judgment. Record, p. 405.

The judgment of the trial court, which was affirmed by the Court of Appeals, is in the record at pages 68 to 70.

The decision of the trial court is in the record at pages 62 to 68.

The exceptions, which raised questions of law in the case, were by the act of the parties stipulated out of the case after the judgment had been entered on the decision of the referee. Record, pp. 389 to 392.

The assignment of errors will be found in the record at pages 412 to 414.

The only assignments of errors which can be claimed as having any possible application to the questions here raised are, I½, XII, and XIII.

FACTS.

The suit was in equity to restrain the plaintiff in error from violating two contracts and for an accounting and damages.

(*See Contracts A and B. Rec., pp. 7 to 19.*)

The plaintiff in error set up, amongst many other defenses, that the contracts "are in violation of and "to that end, defendant (plaintiff in error) expressly "pleads the Act of Congress of the United States, ap- "proved July 2, 1890, being Chapter 647 of the first "session of the Fifty-first Congress, entitled 'An Act "to Protect Trade and Commerce against Unlawful "Restraints and Monopolies.'"

Record, p. 41.

The trial court found and decided as follows:

"That all of the contracts in evidence were and are "legal, valid and binding contracts, such as might "reasonably be made under the circumstances, founded "upon an adequate consideration, and that they em- "bodied no illegal restraint, and are not repugnant "to any rule of public policy as in restraint of trade, "or tending to create a monopoly, trust, or any other "illegal combination; and that the contracts entered "into between the defendant and the National Har- "row Company of New York, including contracts A "and B, are and were intended to be continuing con- "tracts, and should be enforced according to their "true intention and meaning as hereby interpreted."

Record, p. 67.

The New York Appellate Division of the Supreme Court on an appeal from the judgment entered on the decision of the referee reversed the judgment and ordered a new trial. In their amended order and judgment of reversal the court say:

"Ordered, adjudged and decreed that the judgment "so appealed from be and the same is hereby re- "versed on grounds other than those arising on the "exceptions taken to the decision of the referee in re-

"ceiving or rejecting appellant's evidence, and a new "trial is ordered."

See Order Record, p. 393 *; also amendatory order p.* 394.

The parties entered into an agreement which was and is in the record, by which they agreed that the questions which should be raised in the New York Appellate Division were "to be only as follows:" * * * 4. Whether or not the contracts A and B are valid under the "Act of Congress approved July 2, 1890, "Chapter 647, of the first session of the Fifty-first "Congress." * * * Second, it is stipulated that the exceptions taken by the appellant (the plaintiff in error) to the rulings by the referee in receiving or rejecting evidence, are waived in the Court of Appeals, in the event of the judgment being reversed in this Court (N. Y. Appellate Division of Fourth Department of N. Y.) on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's (plaintiff in error) evidence, and this clause of the stipulation is to operate upon the present appellant (plaintiff in error) in the Court of Appeals in the event of the appeal."

Record, p. 389, 390, 391.

The second clause of the stipulation was made opperative in the Court of Appeals by the order and judgment of the Appellate Division of the Supreme Court before quoted.

There was no finding by the Trial Court that the subject of the litigation related to an article of inter-state commerce, nor was there any facts alleged, or proven from which the Trial Court could have made a finding that the contracts involved a question of inter-state commerce.

The contracts were executed in the State of New York, and by their terms were to be performed, in that State and it was agreed that they were to be interpreted under the laws of that State.

See Clause 17, *Rec., pp.* 11 *and* 18.

POINTS.

I.

The statute of New York State limited the Court of Appeals, solely to the examination of questions of law. The statute is :

"Upon an appeal to the Court of Appeals from a "judgment, reversing a judgment entered upon the "report of a referee, or a determination in the Trial "Court ; or from an order granting a new trial, upon "such a reversal ; it must be presumed that the judg- "ment was not reversed, or the new trial granted, "upon a question of fact, unless the contrary clearly "appears in the record body of the judgment or order "appealed from."

N. Y. Code of Civil Procedure, § 1338.

Neither the order nor judgment appealed from contained in the record body a statement that the judgment appealed from was reversed and a new trial granted "upon a question of fact."

The stipulation previously quoted took out of the case all exceptions which would raise any question of law in the New York Court of Appeals.

Aside from this the interpretation of the statutes of the State by the Court of Appeals bound it to accept the findings of the Trial Court, and the only question of law left the court to decide on the appeal was whether the facts found by the referee warranted the conclusions of law.

National Harrow Co. v. Bement & Sons,
163 *N. Y.*, 505, *and cases there cited.*

(*a*) The Constitution of New York State, adopted in 1895, limited the inquiry in the Court of Appeals "to the review of questions of law."

Article VI, § 9.

The Court of Appeals, therefore, rightly held that there was no questions of law open for review in that court.

No federal question was in issue or decided in the Court of Appeals.

II.

This court under a long line of adjudications has held that it is bound by the decisions of the highest court of a State touching the interpretation of its laws and its Constitution.

Western U. T. Co. vs. Call. Pub. Co.,
181 *U. S.*, 92.

Gardner vs. Bonesteel, 180 *U. S.*, 262.

Merchants' Bank vs. Pennsylvania, 167
U. S., 461.

Commercial N. Bank vs. Chambers, U.
S. S. Ct. Dec., July 1, 1901, *p.*
863.

Yazoo & M. Ver. Co. vs. Adams, U. S. Sup. Ct. Dec., June 15, 1901, *p.* 729.
Mattee vs. No. Carolina, U. S. S. Ct. Dec., June 15, 1901, *p.* 730.

The decision of the Court of Appeals touching its power of review of the cases before it must in the nature of things be accepted by this court as conclusive.

III.

There are no facts pleaded or found which show or tend to show that the questions involved in this record related to an article of interstate commerce. The fact that the agreements were licenses to use certain United States letters patent under stipulations does not raise a federal question.

Dale v. Hyall, 125 *U. S.*, 46–54.

IV.

In order to raise a federal question in this court the record must show that a federal right, privilege or immunity was claimed, either under the Constitution, treaties or laws of the United States, and a distinct and definite issue taken therein and that the decision of the State court was adverse to such Constitution, and such a question cannot be raised in the assignment of errors or in a stipulation made after the trial and decision of the case.

Cin., H. & D. R. R. Co. v. Thiebaud, 177 *U. S.*, 615–621.

Cornell v. Green, 163 *U. S.*, 75–81.
Ausbrow v. U. S., 159 *U. S.*, 695–698.
Muse v. Arlington, 168 *U. S.*, 430–437.

There is not one word in the record which shows or tends to show that a federal question was decided either in the Trial Court or in the Appellate Division or in the Court of Appeals.

(*a*) There was not only no federal issue distinctly raised, but the findings of the Trial Court, which are as binding on this court as they were on the Court of Appeals, distinctly found that there was no trust or other monopoly involved in the contract.

This finding is conclusive in this court.

V.

The writ of error should be dismissed and the case remanded to avoid further expense.

Utica, October 2, 1901.

EDWIN H. RISLEY,
Attorney and Counsel for Defendant in Error.

Office Supreme Court
FILED
MAR 6 1902
JAMES H. McKENNEY, Clerk.

No. 215.

EDWIN H. RISLEY.
Of Counsel for Defendant in Error,
Utica, N. Y.

Brf. of Risley for D. E.

SUPREME COURT,

Filed Mar. 6, 1902.

OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 215.

E. BEMENT & SONS,

Plaintiff in Error,

vs.

THE NATIONAL HARROW COMPANY,

Defendant in Error.

FILED DEC. 19th, 1900.

(18,003.)

BRIEF ON THE MERITS FOR THE DEFENDANT IN ERROR.

MOTION TO DISMISS.

The motion to dismiss the writ of error and the briefs filed therewith at the opening of the present term of this Court and ordered to be heard with the merits, is now urged for final determination by this Court.

STATEMENT.

The writ of error to this Court brings up for review the judgment and proceedings of the N. Y. Court of Appeals, reported in 163 N. Y. 505.

Rec. pp. 1 and 2.

The decision of the N. Y. Court of Appeals was made the judgment of the Supreme Court of that State by an order of the latter Court.

Rec. p. 405.

The decision of the Trial Court found all the material issues in favor of the defendant in error.

Rec. pp. 62-68.

All exceptions and rulings of the Trial Court taken in the progress of the trial and all exceptions taken to the decision of the Trial Court, saving only eight separate questions, were eliminated from the case in the Court of Appeals by the agreement of the parties.

Rec. pp. 389-392.

The assignment of error in this Court is in the record at pp. 412-414.

The assignment of error which is supposed to raise

a Federal question are numbered I, ½, XII, and XIII, pp. 412, 413, 414.

The suit is one in equity brought by the defendant in error against the plaintiff in error to restrain a repetition of breaches of two contracts which licensed the plaintiff in error to use certain United States letters patent during the lifetime of the patents on which the licenses were based and to restrain the plaintiff in error from committing further breaches of the contracts.

See Contracts, Rec. pp. 7-19.
Exhibits A and B.

The plaintiff in error set up as a defense to the contracts, that they were in common law restraint of trade and were therefore void.

See answer, Rec. pp. 23-31.
See Exhibit attached to the Answer, Rec. pp. 32-59.

Among other defenses set up in the answer, it was in substance alleged that the contracts, A and B, were and are void and the plaintiff in error expressly pleads the Act of Congress of the United States, approved July 2nd, 1890, being Chapter 647 of the first session of the 51st Congress entitled "An Act to Pro-"tect Trade and Commerce against Unlawful Re-"straints and Monopolies."

Rec. p. 41.

The issue attempted to be raised by this statement in the answer was not raised or passed upon in either the Trial Court or on appeal to the Appellate Division or in the Court of Appeals, except it was one of

the questions embraced in the 4th paragraph of the agreement of the parties.

Rec. p. 390.

The issues raised in the case were by an order of the court duly referred to Hon. William A. Matteson, of Utica, N. Y., to hear, try and determine the case, and his decision stands by the laws of the State of New York as the decision of the Supreme Court of that State.

See Order, Rec. pp. 59–60.

The Trial Court decided that all of the contracts in evidence, several in number, were valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant (plaintiff in error) and the National Harrow Company of New York, including contracts A and B, by their terms were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

Rec., p. 67.

The decision of the trial Court will be found in the Record at pp. 62–68.

The judgment entered upon the decision of the court will be found in the Record at p. 71.

The federal question as to whether the contracts were affected by the act of Congress of July 2d, 1890, was not raised in the trial Court by any specific ob-

jection, motion or ruling, nor was that question raised or presented to the court for its decision.

The plaintiff in error took an appeal from the judgment entered on the decision of the trial Court to the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Department.

Rec. p. 368.

After the case had been argued in the Appellate Division and submitted to the Court for its decision, it was found that the record as presented did not contain a certificate which permitted that Court to examine or review the facts. A motion was made by the plaintiff in error to be relieved from this objection, the Appellate Court made an order on terms that the appellant (plaintiff in error) should make and serve a new case and exceptions within thirty days, which should contain all the evidence and proceedings had before the trial Court and the Court ordered the case to be sent back to the trial Court for resettlement.

See order, Rec. pp. 386-387.

The plaintiff in error failed to comply with the requirements of this order by omitting to make and serve a new case and exceptions containing all of the evidence and proceedings had before the trial Court. On the settlement of the case and exceptions before the trial Court, it refused to grant the necessary certificate that the record did contain all of the evidences and proceedings had before that Court.

Rec. pp. 388-389.

The record on the appeal, therefore, was not in position to enable the Appellate Court to pass upon and review questions of fact raised by the evidence.

The parties then entered into a stipulation in writing in which was recited the various steps taken on the appeal in which it was stipulated as follows:

"First. That the foregoing record as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee, material to the questions to be raised on this appeal by the appellant (the plaintiff in error), which questions to be raised by the appellant (plaintiff in error) on this appeal are to be only as follows:

"1. The validity of the contracts A and B attached to the complaint.

"2. Whether or not the acts of the defendant in executing the contracts A and B were and are ultra vires.

"3. Whether or not this plaintiff has lost its right to sue by not commencing to make the manufactured articles prior to the bringing of this suit.

"4. Whether or not the contracts A and B are valid under the 'act of Congress approved 'July 2, 1890, chapter 647, of the first session 'of the 51st Congress.'

"5. Whether or not the 'Lever,' 'Lansing,' and 'Reliance' harrows are and were, and are and were known to the trade as 'float spring 'tooth harrows.'

"6. Whether or not the five dollars ($5.00) provided for as liquidated damages in contracts A and B are liquidated damages or whether it is a penalty.

"7. As to the number of harrows sold in viola-
"tion of the contracts and as to the amount of
"damages.

"8. The exceptions taken to the evidence.

"Second. It is stipulated that the exceptions
"taken by the appellant (plaintiff in error) to
"the rulings of the referee in receiving or reject-
"ing evidence are waived in the Court of
"Appeals, in the event of the judgment being
"reversed in this court (Appellate Division,) on
"grounds other than those arising on the excep-
"tion taken to the decision of the referee in re-
"ceiving or rejecting appellant's (plaintiff in
"error) evidence, and this clause of the stipula-
"tion is to operate upon the present appellant
"in the Court of Appeals in the event of the
"appeal by the respondent (defendant in error)
"from the judgment of reversal in this court to
"the Court of Appeals."

See Stipulation, Rec. pp. 389-390-391.

This stipulation was embodied in the record and the case was then submitted to the Appellate Division for its decision.

The Appellate Court reversed the judgment and in the order and judgment of reversal it was adjudged

"That the judgment so appealed from be, and
"the same hereby is reversed on grounds other
"than those arising on the exceptions taken to
"the decision of referee in receiving or rejecting
"the appellant (plaintiff in error) evidence and
"a new trial is ordered with costs to abide the
"event."

The opinion of the Appellate Court tends to show that the judgment was reversed on questions of fact, to wit:

That contracts A and B were in common law restraint of trade.

The Federal Statute was not referred to in the opinion of Judge Follett, nor is there anything in the record to show that a Federal question was read or decided.

See opinion, Rec. pp. 396-401.

The defendant in error brought an appeal from the Appellate Court to the N. Y. Court of Appeals, where the judgment of the Appellate Court was reversed and the judgment of the trial Court affirmed.

In the opinion of Judge Parker, in the Court of Appeals (163 N. Y. 505) the decision of the case in that Court turned wholly upon the interpretation of the State constitution and laws.

The N. Y. Court of Appeals decided that under the statutes and constitution its jurisdiction was limited to considering errors of law only and that it was bound under the laws and constitution of the State of New York to accept the decision of the trial Court on the facts.

This Court should keep in mind the fact that under the stipulation of the parties, all rulings and exceptions in the progress of the trial and all questions of law raised by the exceptions to the decision of the reply were expressly stipulated out of the case in the N. Y. Court of Appeals saving only the questions reserved by the stipulation.

See questions stipulated, Rec. p. 390.

The eighth proposition submitted to the General Term to wit, "the exceptions taken to the evidence" was expressly stipulated out of the record in the Court of Appeals.

The seven remaining questions referred to questions of fact which the Appellate Division had the power if they chose to consider under the stipulation, were considered by that Court and decided in favor of the defendant in error.

The Appellate Division reversed the judgment on questions of *law only*, and there being no exceptions in the record which permitted that Court to reverse the judgment on that ground, the Court of Appeals was by the statute, and Constitution of New York and by a long line of adjudgments forced to reverse the judgment of the Appellate Court, because no errors of law appeared in the record. The Court of Appeals never passed upon the question of the Federal Statute or its application to the contracts, because that question was not raised where it could have been passed upon.

Under the Federal Statute, authorizing a writ of error to this Court from a decision of the N. Y. Court of Appeals can only be sustained, where the record shows that a Federal question, touching a treaty or a constitutional right or a Federal statute is drawn in question and the validity of a statute of, or an authority exercised under any state, or on the ground that it is repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority

exercised under, the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed.

In order to find that a Federal question is raised in this record, the plaintiff in error will contend that the contracts were made in violation of the provisions of the act of Congress approved July 2nd, 1890, Chapter 647 of the first session of the 51st Congress, and this Court will be urged to examine the facts appearing in the record to determine this question.

The defendant in error denies that it is the province of this Court to re-examine all of the facts upon which a Federal question is alleged to be based.

The plaintiff in error, contends that the findings and decision of the trial Court expressly excludes the idea that any Federal question was raised or decided by the trial Court or in the Appellate Court or in the Court of Appeals.

If this Court finds it necessary to examine the facts appearing in the record, the following statement contains a record of the facts established by the proof.

1. D. C. & H. C. Reed & Company, of Kalamazoo, Michigan, were the practical harrow pioneers. They first manufactured under the Garver patent. Some time afterward, G. B. Olin & Company of Canandaigua, N. Y., commenced to make harrows. Originally, Reed & Co. owned all the then existing

patents, and Olin & Co. were their licensees thereunder, but the patents were afterwards owned and controlled by them in separate territories. At a later period, after a great deal of litigation, licenses were taken under the patents by Chase, Taylor & Company, and Lawrence, Chapin & Company, both of Kalamazoo, Michigan; J. M. Childs & Co., of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y. The licenses were granted by Olin & Co.

Referee's Report, p. 62.
Reed, pp. 132, 137.
Childs, pp. 117, 128, 348.

2. Prior to and at the time of the agreement in the summer of 1890, for the organization of the New York corporation, the National Harrow Company, there had been and was a great deal of litigation under the patents named and others obtained and owned by Reed & Co., Olin & Co. and other manufacturers. A number of patent suits were pending between the different manufacturers and by some of them against the customers of the others. Reed & Company claimed that every one infringed their patents. They sued customers of E. Bement & Sons, which latter company had acquired the Paddock patent, and claimed that it antedated the Reed patents. This suit was defended by E. Bement & Sons, and an injunction had been obtained therein against the latter's Clipper Harrow. The Eureka Mower Company had also been enjoined from making its harrows. A final decree had been entered against Chase, Taylor & Co. and W. S. Lawrence, establishing the validity of the patents they infringed and ordering an accounting of profits. E. Bement & Sons had sued G. B. Olin & Co. for alleged infringements of the Paddock patent. Thousands of dollars had been expended by the various manufac-

turers in these litigations and matters connected therewith. Customers of the different manufacturers were threatened by the other manufacturers with suits for the infringement of patents. In some instances, users of the harrows made under the Garver patent had been compelled to pay ten dollars for each harrow. The trade was thoroughly demoralized. Reed & Co. and Olin & Co. had compelled J. M. Childs & Co. to pay about $10,000; Lawrence Chapin & Co., $25,000, and A. W. Stevens & Son between $30,000 and $40,000, as royalties and damages for harrows manufactured and sold by those firms.

Referee's Report, p. 62.
Reed, pp. 137, 138.
Childs, pp. 128, 333.
Brinkerhoff, p. 328.
Bement, pp. 183, 233, 236.

3. After an examination of patents submitted "by "every claimant and the drawings and claims there-"under," under the arbitration agreement hereinafter mentioned, Mr. Cookinham and the other arbitrator found as facts: "That many of the harrows manu-"factured by licensees who commenced manufactur-"ing the particular style of harrows made by them "within the last few years, infringe many of the "patents held by licensees, who preceded them in "business.

"That the licensees who commenced the business "of manufacturing harrows within the past few years, "have procured patents upon certain devices or com-"binations applicable to harrow, but that many of "such patents are of little value in comparison with "the older patents, which clearly anticipate the later "ones; if not in every particular, yet they do antici-

"pate them in regard to many of the essential ele-
"ments employed."

pp. 313, 315.

4. The relation between the six manufacturers named in Subd. 1 was simply that of licensor and licensee, with an agreement as to prices at which harrows should be sold when made under the patents controlled by Reed & Co. and Olin & Co.

Reed, p. 137.
Childs, p. 129.

5. In the face of this situation, each of such six manufacturing firms was compelled to do something to protect its customers and business. In the summer of 1890 they agreed to form the New York corporation, The National Harrow Company. The certificate of incorporation was filed September 2d, 1890, the incorporators and directors for the first year named in the certificate being members of such firms.

Referee's report, pp. 62, 63.
Concession, p. 129.
Certificate of Incorporation, p. 146.
Reed, pp. 137, 138.
Brinkerhoff, pp. 307, 308.
Bement, p. 183.

6. When the company was organized there was no agreement in reference to other manufacurers becoming stockholders thereof, or licensees under the patents to be assigned to it. The following firms and corporations were then manufacturing float spring tooth harrows and had not been seen or communicated with by any one in reference to such incorporation, or becoming stockholders or licensees

thereof, viz: The defendant, E Bement & Sons, the Eureka Mower Co., Childs & Jones, Herendeen Manufacturing Co., the Pitts Agricultural Works of Buffalo, Syracuse Chilled Plow Co., Clipper Chilled Plow Co. of Elmira, N. Y., Hench & Dromgold of York, Pa., DuWayne B. Smith Co. of Utica, McSherry Manufacturing Co., Farmers' Friend Manufacturing Co. of Dayton, O., George Sweet & Co., Dansville, N. Y., L. C. Lull & Co. of Kalamazoo, D. O. Everest & Co. of Kalamazoo, Williams Manufacturing Co., Walker Manufacturing Co. of Moravia, N. Y., John J. Fry & Co., Portland, Me., Ira Hunt of Kalamazoo, Michigan, and Peter Wilms of Holland, Mich.

Bement, p. 183.
Childs, pp. 128, 129.
Brinkerhoff, p. 307.

7. The six firms named in Subd. 1 assigned all their patents and rights under patents to the New York corporation and accepted licenses thereunder from it. On November 10th, 1890, William Strait and others, doing business under the name of The Clipper Chilled Plow Co., of Elmira, agreed to become licensees of the New York corporation and delivered, in escrow, papers to that effect, but in a suit by such firm the agreement was cancelled. Afterwards they became licensees of the New York corporation.

Referee's Report, pp. 62,63.
Brinkerhoff, p. 323.
Strait, pp. 162, 164.
Judgment, p. 364.
Letters to Deft., pp. 178, 301, 302.

8. On September 17th, 1890, the defendant agreed

conditionally to become a stockholder and licensee of the New York corporation, and papers to that effect were delivered in escrow. This agreement never went into effect, because the corporation, on the 27th or 28th of May, 1891, refused to accept the conditions. There were no operative papers between the New York corporation and defendant prior to June 17th, 1891.

Referee's Report, p. 63.
Exhibit 136, pp. 337, 338.
Risley, pp. 335, 337, 339.
Brinkerhoff, pp. 323, 326, 327.
Bement, p. 226.

9. Exhibits Nos. "1, 2, 3, 4 and 5," mentioned throughout the case, were received in evidence at the beginning of the trial as stated at fols. 72-73. They are as follows :

Exhibit No. "1," is License Contract A, annexed to the complaint and printed at pp. 7 to 13.

Exhibit No. "2," is License Contract B, annexed to the complaint and printed at 13 to 19.

Exhibit No. "3," is agreement dated April 1st, 1891, confirming the assignment, sale and transfer of patents and pending applications for patents, and selling, assigning and transferring the same, and all rights, interests and titles therein and thereunder of the party of the second part, to the New York corporation, its successors and assigns, declaring such New York corporation to be the sole and absolute owner thereof, free and clear from any and all claims, agreements and covenants in relation thereto, selling, assigning and re-conveying by the New York corporation to the second party thereto, its successors and

assigns, all the interests and property theretofore transferred to it by the said second party, including the good will of the Float Spring Tooth Harrow business of such party, and all contracts, agreements, instruments, covenants and promises theretofore executed, transferred and set over to the said New York corporation by such party; except that the assignments of and all the rights in and to under said patents, so conveyed by the said party of the second part to such New York corporation, were confirmed in it, but all other obligations, rights and interests as between the parties were cancelled and declared to be of no force and effect, and each party released and discharged from all claims for damages thereunder. It provided for the arbitration of all questions as to the value of each and every patent and rights thereunder so conveyed to the said New York corporation; that the decision of the arbitrators should be final and conclusive upon the parties thereto, and should be rendered in duplicate, in writing, before July 1st, 1891; and that the New York corporation should issue to the second party, its successors or assigns, the paid up capital stock of the New York corporation to an amount equal to the value of such patents, and all rights thereunder so assigned, as found, fixed and determined by the said arbitrators within thirty days after the ascertainment and report of such value. It is printed in the judgment roll and attached to the amended answer at pp. 50 to 52.

Exhibit "5" is the escrow agreement, dated April 1st, 1891, which provided, among other things, that in case any of the parties named therein should omit to execute and deliver the contracts and licenses on or before June 1st, 1891, delivery of the escrow

papers should be made in case of its being directed by a resolution of the Board of Trustees of the New York corporation of such as should have been signed and executed ; but if the New York corporation concluded not to accept any less number than the whole of such contracts and licenses executed by all the parties named in the escrow agreement, then Edward Norris, in whose hands the same were to be placed, should cancel each of said contracts and licenses, and they should be null and void. It is printed as part of the judgment roll at p. 50.

Exhibit No. "6," dated April 1st, 1891, provided for the payment by the party executing it to the New York corporation of $1.00 in cash for each Float Spring Tooth Harrow sold and shipped by it between September 10th, 1890, and the delivery of the license. It is printed at p. 72.

10. Exhibits "1," "2," "3," "4" and "5" were signed by all the parties named in Exhibit "4," except the Syracuse Chilled Plow Company, and delivered by them to Norris in escrow. The defendant signed and delivered them on June 16th or 17th, 1891, the controversy over the La Dow contracts, with defendant having been arranged by defendant indemnifying the New York company against all liabilities to La Dow, and releasing it from defending any litigation with him growing out of the contracts or patents owned by him, so far as applicable to the "Steel King." Defendant is litigating with La Dow and has wrested one patent from him. The papers in escrow were delivered June 17th, 1891, under a resolution of the Board of Directors of the New York corporation adopted upon Bement's motion. These Exhibits "1," "2," "3," "4" and "5" are the only agree-

ments between plaintiff and defendant that ever went into effect.

Referee's Report, p. 63.
Arbitrators' Award, p. 319.
Concessions, pp. 114, 308.
Resolution, p. 351.
Letter to Bement, Exhibit 121, p. 30.
Meeting of Licensees, pp. 350, 353.
Bement, pp. 227, 262.
Reed, p. 139.
Risley, pp. 154, 156.
Brinkerhoff, pp. 308, 309, 323, 324, 326, 327.
Bond, pp. 353, 354.

Counsel advised that the licensed contracts were within the New York corporation rights under its patents.

Childs, pp. 122, 123.

11. On June 17th, 1891, the arbitrators, Hon. H. J. Cookinham being one, proceeded to hear the arguments, make their examination, etc. All the parties who had signed the Exhibits 1, 2, 3, 4 and 5 appeared, or had their representatives before the arbitrators. Arguments were made and submitted by Bement and such other parties, or their representatives.

Referee's Report, p. 63.
Arbitrators' Award, p. 313.
Letters to Bement, pp. 304-305.
Bement, p. 292.
Risley, p. 156.
Stevens, pp. 114-115.
Reed, p. 139.
Brinkerhoff, pp. 145-147.

12. The arbitrators' award was made in June, 1891, and accepted by all, except the defendant, who insisted upon receiving more of the New York corporation's capital stock. The differences were adjusted by its being allowed and receiving $16,000 additional stock of the plaintiff. Stock of the New York corporation, and of the plaintiff, was issued and delivered in accordance with the awards to the firms and corporations, or the parties designated by some of the latter. No stock was issued to any one until after the award.

Referee's Report, pp. 63-64.
Arbitrators' Award, pp. 313, etc., 315.
Concessions, pp. 115, 320, 353.
Defendant's order and receipt, pp. 115-116.
Agreement, pp. 342-343.
Stevens, pp. 113, 115-116.
Bement, pp. 227, 261-262.
Brinkerhoff, p. 309.
Childs, pp. 348, 353.

13. By order of the Board of Directors of the New York corporation, the old agreements and licenses, which had existed with some of the licensees at the time of the entry of the Strait judgment, February 17th, 1891, were surrendered, cancelled and destroyed, they have been cancelled by Exhibit 3, except as stated therein. The separate assignments of patents, rights under patents and applications pending for patents were not surrendered or destroyed. This left Exhibits 1, 2, 3, 4 and 5, the only agreements existing between the New York corporation and its stockholders and licensees. They are the only agreements between the plaintiff and its stockholders and

licensees, they have been assigned by the New York corporation to the plaintiff, as hereafter stated.

Exhibit 3, pp. 50, 52.
Risley, pp. 154, 155, 156, 342.
Bement, pp. 227, 247.
Childs, p. 129.
Stevens, pp. 113-114.
Reed, p. 139.

14. All the then licensees, including the defendant, assigned and transferred to the New York corporation their patents, rights under patents and pending applications for patents, by separate written assignments thereof and accepted licenses thereunder from it.

Referee's Report, pp. 63-64.
Arbitrators' Award, pp. 313.
Concessions, pp. 115, 308.
Assignments, pp. 263, 351, 352, 353.
Brinkerhoff, pp. 308, 323, 327.
Bement, p. 264.

15. The harrows manufactured by the defendant and the other licensees were and are claimed to be covered by the plaintiff's patents. The award of stock issued to defendant and the other licensees was in settlement of all controversies and in payment of the patents, rights under patents and pending applications for patents, assigned by them respectively.

Referee's Report, p. 64.
Arbitrators' Award, p. 313, etc.
See preceding Subs. 2 and 3.

16. The following parties manufacturing harrows, are not licensees of the plaintiff: A. B. Farquhar, of York, Pennsylvania; Smith & Tate Co., of

Harrisburg, Pennsylvania; The Clipper Chilled Plow Company, of Elmira, N. Y.; Hebbner & Sons; Peter Wilms, of Holland, Michigan; Turner Manufacturing Company, of Lagrange, Indiana; Whipple, of St. Johns, Michigan, and D. S. Morgan & Company, of Brockport, N. Y. There are a number of harrows on the market besides the float spring tooth harrows, which are manufactured and sold in large quantities in the United States.

Brinkerhoff, pp. 147, 148, 151, 310.
Metcalf, p. 333.

17. By the conditional agreement of September 17, 1890, defendant required that its president, Bement, should be made a member of the Executive Committee of the Board of Directors of the New York corporation by the resignation of one of its members and Bement's election in his place. Moses Hill resigned as a director and member of such committee and Bement was elected in his place on October 8th, 1890. He continued an active director and member of such committee and during the existence of the corporation.

Agreement, p. 337.
Resolutions, p. 308.
Childs' letter to Bement, dated Dec. 8th, 1890, p. 300.
Bement, pp. 232, 233.
Brinkerhoff, p. 92.

18. On July 31st, 1891, the plaintiff was incorporated under the laws of New Jersey. Its certificate of incorporation states "that the objects for which "this company is organized are to manufacture, pur-"chase and sell agricultural implements and machin-"ery and the rights to make and use the same, and

"all the lawful business incidental thereto." None of the incorporators were manufacturers of harrows.

Referee's Report, p. 65.
Certificate, p. 156, etc.

19. Bement was elected a director of the plaintiff and a member of its Executive Committee soon after its incorporation and so continued actively participating in the management until September, 1893. He was again elected a director in 1894, and is still one.

Referee's Report, p. 65.
Childs, p. 125.
Brinkerhoff, p. 92.

20. In September, 1891, the New York corporation sold and transferred to the plaintiff its patents and interest in patents, pending applications for patents, and all moneys, merchandise, licenses, agreements, contracts and property, except $1,000 in cash, for $455,000, in full paid up stock of plaintiff, at par, which was divided among the stockholders of the New York corporation and substituted for the latter's stock as fixed by the arbitrators' award. Bement received, by direction of the defendant, 292 shares of the plaintiff's stock, being the $29,200 mentioned in such award. The New York corporation was soon thereafter dissolved.

Referee's Report, p. 65.
Concession, p. 320.
Resolutions, pp. 349, 354, 355, 356.
Bill of Sale, p. 73.

21. The New York corporation and plaintiff acquired patents from parties who became licensees after the arbitrators' award, and by purchase from others.

They granted licenses for $1.00 royalty on each float spring tooth harrow to all applicants therefor, whose business character and responsibility warranted their so doing, and when not in conflict with other licenses.

Brinkerhoff, pp. 145, 308, 322-323, 326.

22. The words "float spring tooth harrows, float "spring tooth harrow frames and attachments appli- "cable thereto." used in the licenses to defendants and others, were "intended to and did embrace all "harrows having curved spring teeth, excluding only "wheel harrows employing curved teeth where the "frame bars and teeth are supported by the over- "hanging axle-tree on which the wheels are mounted, "of more than thirty inches diameter, being the class "of wheel spring tooth harrows which were manufac- "tured by the defendant at the date of making the "license contracts."

Referee's Report, p. 66.
Brinkerhoff, pp. 107, 108, 144, 145.
Stevens, pp. 112-113.
Childs, pp 117, 118, 119, 123, 125, 126, 127.
Reed, pp. 132, 135, 138-139, 140.
Walker, pp. 142-143.
Coleman, pp. 79, 80, 81.
Metcalf, pp. 328-329.
Strait, pp. 164, 166.
See cuts of Reed's Wheel Harrows, pp. 132, 133, 134.
See cut of Defendant's Wheel Harrow, p. 119.
Childs' Catalogue, 1884.
Olin & Co.'s Wheel Harrow, pp. 123, 125.

(*a*) When the meeting was held in Buffalo, in the summer of 1890, to organize the New York corporation and Board of Directors, Reed, representing his company, and Tuttle, representing G. B. Olin & Co., objected to including in the licenses wheel harrows, as they were both manufacturing wheel spring tooth harrows. The word "float" was inserted in the licenses so as to exclude such wheel harrows as they were then making.

Reed, pp. 132, 135, 139.
Stevens, pp. 112-113.
Brinkerhoff, p. 109.
Childs, p. 128.

(*b*) At a meeting of the directors of the New York corporation in October, 1890, at Buffalo, the matter was brought up and every one conceded that such wheel spring tooth harrows were not float spring tooth harrows within the terms of the licenses agreed upon.

Reed, pp. 132, 135.
Brinkerhoff, pp. 107, 108, 109, 308.
Childs, p. 128.
Bement, pp. 226, 256.

(*c*) In October, 1890, Reed & Co., Olin & Co., The Gale Manufacturing Company, A. W. Stevens & Son, L. C. Lull & Co., Lawrence, Chapin & Co. and defendant were manufacturing wheel spring tooth harrows.

Reed, pp. 132, 135, 139.
Brinkerhoff, pp. 108-109.

(*d*) At the time the form of license was discussed and determined in September and October, 1890, the only wheel spring tooth harrows on the market were

such as described above. The parties and the trade understood the words "float spring tooth harrows" to be any harrow with spring teeth attached, rigidly or adjustably, to a frame and, when in practical operation, the frame shoes or runners thereunder rest on the surface of the ground or come in contact therewith. Bement was present at the October meeting and participated in the discussion.

Stevens, pp. 112, 335.
Childs, pp. 116, 117, 118, 119, 334, 335.
Brinkerhoff, pp. 107, 109.
Reed, pp. 138, 139.
Coleman, pp. 79, 80.
Metcalf, pp. 329, 330.
Walker, pp. 142, 143.
Strait, pp. 164, 166.
See Subd. 22.

(*e.*) Licenses by the New York corporation, or by the plaintiff, have been granted on float spring tooth harrows where the teeth were fastened to the frame, or to some attachment to the frame, rigidly, and were not adjustable, to the following manufacturers, viz: John G. Higgins, of Charleston, Maine; Childs & Jones, D. B. Smith Company, of Utica, N. Y.; Herndeen Manufacturing Company, Hench & Dromgold, D. C. & H. C. Reed Company, of Kalamazoo, Michigan; D. M. Osborne Company, Auburn, N. Y.; Syracuse Chilled Plow Company, of Syracuse, N. Y.; Walker Manufacturing Company, of Moravia, N. Y.; Pitts Agricultural Works, of Buffalo, N. Y.; Gale Manufacturing Company, Albion, Michigan; Buchler & Gibbs Plow Company, of Canton, Ohio, and George Sweet & Company, of Dansville, N. Y.

Brinkerhoff, p. 324.

(*f.*) Licenses have been granted by the New York corporation or by the plaintiff on float spring tooth harrows where the teeth were adjustable, either on the frame or on some stationary portion attached to the frame, to the following manufacturers, viz: Charles H. Childs & Company, Childs & Jones, D. B. Smith Company and the Eureka Mower Company, of Utica, N. Y.; Syracuse Chilled Plow Company, of Syracuse, N. Y.; D. C. & H. C. Reed Company, Taylor & Henry, L. C. Lull & Company, W. S. Lawrence, Williams Manufacturing Company, Lever Spring Tooth Harrow Company, of Kalamazoo, Michigan; D. O. Everest & Company, of Pine Grove, Michigan; Farmers' Friend Manufacturing Company, D. E. McSherry Company, of Dayton, Ohio; E. Bement & Sons, and the North-Molitor Company, of Lansing, Michigan.

Brinkerhoff, p. 324.

(*g.*) When the New York corporation was organized only a few manufacturers made steel frames. The all-steel frame harrow has been in the market for five or six years.

Reed, p. 139.

(*h.*) After such organization Blaker & Son obtained a patent in 1890 for a lever attachment, and began to put float spring tooth harrows on the market, with such attachment. Most of defendant's witnesses did not hear of such harrows until the fall 1892 or spring of 1893.

Brinkerhoff, pp. 105, 110
Childs, pp. 127, 128.
Metcalf, pp. 328, 332.
Reed, p. 139.
Markham, p. 172.

Brown, p. 215.
Bement, pp. 229, 230.
Molitor, p. 265.
Cook, p. 201.
Brown, p. 215.
Newton, p. 277.
Emory, p. 284.
Blaker harrow, Exhibit, p. 110.

On October 13, 1891, it issued licenses to Blaker & Son similar in form to license, Exhibit A, except the following description of the Blaker harrow, contained in the schedule attached to and made a part of the license: "A float spring tooth harrow, sectional "steel frame, angle bars straight in cross section in "line of draught, with non-adjustable teeth and bars "adjustable simultaneously by a lever, and with the "clips, as shown by sample."

Brinkerhoff, p. 105.
Childs, p. 128.
Bement, p. 247, 248.

Blaker & Son, on taking this license, paid to plaintiff a lump sum as royalties for harrows, with such lever attachments made by them prior to assigning their patent and receiving such license, which license is still in force.

Childs, p. 128.
Brinkerhoff, pp. 105, 106, 328.

(*i.*) Up to that time the market was for wood and steel frames, without lever attachments. At the time of the trial, and for the preceding two seasons, about 60 to 90 per cent. of the steel harrows had lever attachments.

Reed, p. 139.
Childs, p. 125.
Babcock, p. 175.

(23.) At the annual meeting of the plaintiff on September 13th, 1892, and the meeting of its Board of Directors on that day, the licensees and directors considered the licenses in reference to the manufacture of these harrows with lever attachments. D. M. Osborne & Co., who were not licensees of plaintiff, were manufacturing such harrows. Bement was present and participated in the proceedings of both meetings. Childs, Deuel and Bement were appointed a committee, to whom the matter was referred. Deuel was the counsel for the plaintiff, and is an able patent lawyer. He stated his views on the subject at the annual meeting, and the committee reported. On Bement's motion a resolution was adopted at this annual meeting, in substance as follows: That plaintiff license all those that have licenses to build harrows with *lever attachments*, on these conditions:

First. That a member of the board of directors of plaintiff, by a majority vote thereof, be added to act with the executive committee in passing upon the harrows submitted to it, for which a license was desired.

Second. That a full sized working harrow, for which a license was desired, should be submitted to the committee, and if it appeared to such committee that the harrow did not infringe upon the rights of the other licensees of the plaintiff, that then it was empowered to issue such license.

Third. The plaintiff to have full charge and control of the defence of all suits brought against its licensees arising from the granting of such licenses.

Fourth. The committee to meet on November 1st, 1892, at Auburn, N. Y., and pass upon any applications then on file, if accompanied by a sample of a

full size working harrow. If any licensee should not then be ready to submit such sample, then the committee to meet at such licensee's request, on thirty days' notice, at the call of the president, and to pass upon such application ; any party to whom such license should be granted to assign to the plaintiff all patents, applications, licenses, or other rights they might hold, obtain or control in reference to harrows coming within the scope of such license. Royalties on lever harrows to be the same as required to be paid under then existing licenses on other styles of harrows, and payable at the same time and in the same manner ; each licensee or applicant for a license to produce with his application the file wrapper contents of any patent, also abstract of title to such patents, which were to be assigned under such resolution, also copies of all drawings and specifications of pending cases. Before its passage the resolution was considered and reported upon by a committee, of which Bement was a member.

Brinkerhoff, pp. 92-94, 310-311.
Childs, pp. 119-120, 128.
Reed, p. 135.
Stevens, p. 113.
Metcalf, pp. 328-329, 332.

On October 18th, 1892, the board of directors, upon the motion of Mr. Reed, seconded by Mr. Bement, amended this resolution by striking out the clause therein requiring the licensees to give a bond.

Brinkerhoff, pp. 94, 312.

(*a*) The executive committee met in Auburn on November 1st, 1892, all the different licensees having been notified in advance of such meeting. Defendant and most of the other applicants for licenses for harrows, with lever attachments, submitted their

samples. The D. B. Smith Company had been sued for making harrows with lever attachments, and an injunction had been obtained against them. Smith appeared and urged that the suit should be discontinued. Lawrence, Chapin & Co. had been sued to restrain them from manufacturing or marketing a harrow with lever attachments. Both of these companies were under licenses like Exhibits "A" and "B." On motion of Bement, the change in license was referred to Stevens, Childs and Brinkerhoff. Bement wanted a license for the defendant and for the North-Molitor Manufacturing Company. On his motion, other resolutions were passed in reference to the issue of licenses for such harrows, and also to the granting of licenses to D B. Smith Company, Childs & Jones, defendant, and North-Molitor Co.

Stevens, p. 113.
Childs, pp. 120-121.
Brinkerhoff, pp. 106, 310-312.
Reed, pp. 132, 135.
Bement, pp. 229, 230, 248-250, 264.

(*b.*) On October 18th, 1892, at a special meeting held in Buffalo, the plaintiff's board of directors, upon Bement's motion, seconded by Reed, apppointed Brinkerhoff and Childs to confer with D. M. Osborne & Company as to taking licenses from the plaintiff. The executive committee, when in Auburn on November 3d, 1892, received the verbal report of Brinkerhoff and Childs, and accepted it by a unanimous vote. Bement was present, and went with Childs to D. M Osborne & Co.'s to arrange the contract which was afterwards signed, and participated in all the negotiations preceding it. After their report was made to the executive committee, Stevens and Reed were added, when further details came up in reference

to the contract. It was suggested that a committee of the several parties interested canvass the points under consideration at that time, and Bement was one of the members. The substance of the matter in the contract was agreed upon with D. M. Osborne & Co., and it was left with Deuel, the attorney for Underwood & Stork and Mr. Storrow, of Boston, representing D. M. Osborne & Co., to put it into written form. Mr. Storrow is one of the most prominent patent lawyers in the United States. The contract was executed and delivered on February 17th, 1893. The contract included a license to manufacture and sell harrows, with lever attachments, under the description "float spring tooth harrows."

See Contract submitted, Ex. , not printed, but submitted under stipulation.
Brinkerhoff, pp. 148-150.
Childs, pp. 131, 132.
Osborne, p. 177.
Bement, pp. 230, 250.

Shortly afterwards D. M. Osborne & Co. gave notice of its revocation. This was the situation at the time of the anuual meeting on September 12th, 1893. Under a resolution adopted at that meeting Messrs. Childs, Lawrence, Stuart, Brinkerhoff and Stevens were appointed a committee to report on the matter, and did report on the following day. Their report was referred to the Executive Committee with power to act. At a meeting of the Board of Directors, on December 14th, 1893, that committee reported that on December 5th, 1893, it had effected an adjustment with D. M. Osborne & Co., by which the latter paid $1,000, and entered into a contract to pay a royalty of $3,000 for the ensuing year and for four years

thereafter, unless the contract should be revoked by a notice given in the month of August, 1894. This contract was submitted, and the report of the committee accepted and the committee was discharged by a resolution then passed.

Brinkerhoff, p. 150.

There were a large number of infringement suits for using or handling the Osborne harrow pending, when the first contract was negotiated. The prices and terms finally fixed by the Osborne contract were the same as those fixed under licenses for like harrows.

Brinkerhoff, p. 150.
Metcalf, pp. 332, 333.

(*c.*) The litigation with D. M. Osborne & Co. for the manufacturing of such harrows was settled by this contract.

Metcalf, p. 332.

Lawrence, Chapin & Company and D. B. Smith Company were each licensees of the plaintiff under licenses like A, when sued, and each settled with the plaintiff and accepted a license for lever attachments in the fall of 1892.

Brinkerhoff, p. 106.

(*d.*) Under the resolution, and by direction of the executive committee, on motion of Bement, licenses were voted or granted by the plaintiff for lever float spring tooth harrows, where the teeth were bolted rigidly to the bar, or some portion of the harrow, to the following parties: D. B. Smith Company, Childs & Jones, of Utica, N. Y.; D. M. Osborne & Company, of Auburn, N. Y.; Pitts Agricultural Works, of Buffalo, N. Y.; Reed & Company, of Kal-

amazoo, Michigan ; Gale Manufacturing Company, of Albion, Michigan ; Buchler & Gibbs Company, of Canton, Ohio ; Hench & Dromgold ; E. Bement & Sons and the North-Molitor Manufacturing Company, of Lansing, Michigan.

Brinkerhoff, pp. 104, 324.

(*e.*) Under such resolution and by like direction of the executive committee, licenses were granted by the plaintiff for lever float spring tooth harrows, where the teeth were made independently adjustable to some part of the frame to which they are attached, to the following parties, viz :

Childs & Jones, C. H. Childs & Company, D. B. Smith Company, Eureka Mower Company, of Utica, N. Y.; Syracuse Chilled Plow Company, of Syracuse, N. Y.; Stevens & Son, Auburn, N. Y.; Pitts Agricultural Works, of Buffalo, N. Y.; Blake & Blake, of Racine, Wisconsin ; D. C. & H. C. Reed & Company, L. C. Lull & Company, W. S. Lawrence ; Lever Spring Tooth Harrow Company, Taylor & Henry, D. O. Everest, Buchler & Gibbs Plow Company and the Gale Manufacturing Company.

Brinkerhoff, pp. 324, 325.
Childs, p. 121.

(*f*). The licenses for harrows with lever attachment, granted as hereinbefore stated, were accepted by all of such licensees except the defendant and the North-Molitor Company, and are still in force.

Brinkerhoff, pp. 104, 325.

24. The licenses for float spring tooth harrows and such harrows with lever attachment are substantially the same in form, except that the word "lever" is inserted in the latter and the prices thereunder are

different. In each license there is a description of the harrow, duplicates of which the licensee is licensed to make. On Bement's motion, the Executive Committee appointed a committee to superintend the form of the latter licenses, and such committee approved the form and changes therein. There was a difference in the prices between harrows with and those without lever attachment. The prices were fixed by resolution of the Board of the New York corporation when the first form was adopted, and the Executive Committee when at Auburn fixed the prices for harrows with lever attachment. The licenses and prices to all licensees under each form of license are alike, except that one issued to Osborne & Co. provides for the payment of a lump sum instead of $1.00 royalty, as already stated.

Brinkerhoff, pp. 94, 96, 109, 110, 146, 150, 151.
Stevens, p. 114.
Childs, p. 128.
License Contract, Ex. 23, pp. 96, 101.

25. The terms and manner of selling were modified on Bement's motion, on October 18th, 1892. The prices have not remained the same, but were reduced by the Board of Directors, at the request of the licensees. At the annual meeting in 1894 there was a general reduction of prices of such harrows without lever attachment.

Brinkerhoff, pp. 146, 150, 151.
Babcock, p. 175.
Exhibit 48.

All the licensees have agreed thereto except the defendant and the North-Molitor Company. These two companies were notified of the reduction and re-

quested to sign the reduced scale of prices, which they have not done.

Brinkerhoff, pp. 150, 151.

26. All the licensees have complied with the provisions of their licenses except the defendant, the North-Molitor Company, and Hench & Dromgold. The only parties that defendant attempted to prove had violated their licenses were the Standard Harrow Company and Osborne & Company. It failed to prove any such violations by either, and established the fact that both had duly performed their license agreement. Plaintiff has secured an injunction against the violation of their license by Hench & Dromgold.

Babcock, pp. 173, 175.
Concession, p. 177.
Offer of Plaintiff's Counsel, p. 174.
Exhibit 141, 346, 347.

The plaintiff did not know of the violations by the defendant or the North-Molitor Company.

Brinkerhoff, p. 326.

27. Dividends have been received on the stock of the New York corporation and plaintiff, held by Bement for the defendant. These dividends were paid in the years 1891, 1892 and 1893—two in cash and the other credited on the amount due for royalties from the defendant.

Childs, p. 77.
Bement, p. 254.

28. The defendant and its dummy corporation, the North-Molitor Company, never executed the license for harrows with lever attachment, samples of which had been submitted, as

stated in Subdivision 23 (*a*). The licenses and assignments of patents and pending applications were sent soon after the meeting at which the licenses were voted and were received by the defendant. It promised to execute them and claimed that the assignments had been mislaid. Duplicates were sent in December, 1893, with copies of the resolutions adopted on the subject of such licenses.

Brinkerhoff, pp. 101, 102, 104.
Bement, p. 230.
Letter to defendant, p. 102.
Letter from defendant, p. 102.
Letters to defendant, pp. 103–104.

Defendant did not give any notice to the plaintiff that it would not execute the papers other than simply not executing them. It never executed the assignment of its patents and applications for patents which should have been done if the license had been accepted.

Brinkerhoff, p. 104.
Bement, p. 261.

The only license for harrows with lever attachment voted to defendant was one with the teeth fastened rigidly to the bar. It never has had any license for curved teeth adjustably attached to the frame with reenforcing springs attached to the frame and bearing on the teeth to re-enforce their strength.

Brinkerhoff, pp. 101, 326.
Childs, pp. 120, 121.
Bement, pp. 250, 252.
Harrow, submitted for license, in evidence, pp. 95, 96.

Its "Ajax" has adjustable teeth.

Brinkerhoff, pp. 101, 102, 326.
Reed, p. 137.
Coleman, p. 79.
Ajax harrow in evidence, p. 79.

29. The defendant made its last monthly report September 8, 1893.

See report, p. 75.

It received the last license labels from plaintiff March 17, 1894.

Childs, p. 76.

Since March 2, 1893, the defendant has received only 250 labels.

Childs, p. 76.

It has sold since January 1, 1894, 896 licensed harrows.

Bement, p. 281.

All labels prior to March 1, 1891, were 5 cents each. The defendant paid $200 for 4,000 labels, and it also paid $775 for labels at 10 cents each, which paid for 7,750 labels, making 11,750 labels in all.

Childs, pp. 76, 77

The defendant reported and paid royalties on 13,900 harrows prior to September 1, 1893.

Childs, p. 77.

The defendant sold to January 1, 1895, 14,960 licensed harrows.

Bement, p. 281.

This shows a sale of 3,210 more licensed harrows than defendant had received labels for. The total

sales of licensed harrows in excess of those reported and paid for is 960. There could have been no labels on these.

Referee's Report, p. 66.

The defendant ceased reporting harrows sold for the alleged reason "the company had been bought "up by an outside harrow company."

Bement, p. 254.

Bement voted with the plaintiff and other directors to grant permission to Mr. Risley to "buy up the "licenses."

Risley, p. 338.
See contract, pp. 339, 340.

The defendant gave Mr. Risley an option to purchase its harrow licenses and harrow business and granted several extensions of such option. It received $500 for granting one of the extensions.

Risley, pp. 340–342.

The defendant abandoned the license contract in September, 1893, and since that time "has paid no "attention whatever to the license contracts or done "anything to recognize them in any way."

Bement, p. 254.

Defendant sold without plaintiff's knowledge spring tooth harrows which it was not licensed to sell—cuts of which are shown in defendant's catalogue at pp. 87–88 thereof. These are known as the "Ajax," "Reliance" and "Lansing."

Bement, pp. 250, 251, 252, 253.
Brinkerhoff, p. 326.
See Point Nineteenth.

The defendant admitted in its answer, which was put in evidence, that it had not made monthly reports since August, 1893.

Answer, p. 140.

It admitted that it kept books in which it entered harrow sales and that it refused to allow plaintiff's agent to inspect its books during business hours.

Answer, p. 138.

It admitted that the defendant refused to attach license labels to harrows sold.

Answer, p. 140.

It admitted that the defendant sold and had on hand for sale and intended to sell harrows not licensed.

Answer, p. 140.

It admitted that it is now selling harrows not licensed.

Answer, p. 140.

It admitted that it had on hand harrows not duplicates of those left with the plaintiff which are not covered by licenses A and B, and had manufactured and sold some unlicensed harrows.

Answer, p. 141.

It admitted that its traveling salesman sold licensed harrows under price.

Answer, p. 141.

The defendants sold the following unlicensed Spring Tooth harrows:

Reliance, 6.
Ajax, 2,849.
Lansing, 382.
Bement, pp. 281, 282.
Referee's Report, p. 66.

The defendant paid little or no attention to the license contracts or to the price at which the same were sold.

Bement, pp. 234, 254, 251, 275, 276, 282, 292.
Molitor, pp. 268, 269, 290, 291.
Bartholomew, pp. 290, 291.
Coleman, pp. 77, 79.
Ellis, pp. 81, 83.
Bailey, pp. 84, 86.
Waite, pp. 87, 90.
Stevens, p. 335.
Brinkerhoff, pp. 322, 326.
Childs, pp. 130, 334.
Bement Resolution, pp. 214, 325.
Cookinham, pp. 151, 153.
Cook, p. 198.
Brown, p. 211.

The defendant and its officers and trustees organized under the name of the North-Molitor Manufacturing company, a dummy corporation for the purpose of aiding its sales of goods. This dummy corporation has no office or manufactory. The defendant corporation has manufactured and furnished to it a large number Black Diamond Lever Harrows which were not licensed.

Bement, pp. 255, 254-275.
Bartholomew, pp. 290, 291.

THE CONTRACT.

A brief statement of what the contract contains with some citations of authority, will serve, we think,

to show the entire reasonableness of the contract and its freedom from any just ground for criticism and in this regard the essential terms of the two contracts are the same.

The contract in its duration is limited to the life of one or more of the plaintiff's patents as "applicable "to, and embracing the peculiar construction em- "ployed by E. Bement & Sons during the term of "such patent or patents."

They licensed the defendant to "manufacture float "spring tooth harrows, float spring tooth harrow "frames without teeth and attachments applicable "thereto, a sample of which harrows, harrow frames "and attachments were at the date of the license, "in possession of the New York corporation, and "marked and numbered as set forth in schedule "'A' made a part of the license" pp. 7, 8, 11, 14, 16.

The license contract "B" is confined to a territory lying south and west of Virginia, West Virginia and Pennsylvania.

Fowler v. Park, 131 U. S., 88.
American Paper Barrel Co. v. Laraway, 28 Fed. Rep., 141.

The defendant claimed in his printed brief that the patents which the defendant assigned to the plaintiff's assignor covered the harrows which the defendant was manufacturing; it cannot, therefore, be pretended that the licensed harrows were not covered by the plaintiff's patents.

In the recital in the statement that the defendant desired to acquire the right to manufacture and sell harrows, etc., under patents and patented rights then

owned or thereafter acquired by the New York corporation which applied to and embraced such constructions, patents and reissues and for licences thereunder. The agreement that these licenses shall continue during the term of subsequently acquired patent rights, while such an agreement is valid, that condition does not exist in this case.

Hulse v. Bonsack M. Co., 65 Fed. Rep., 864, 869, 870.

It was practically impossible for any patents granted after the date of such licenses to apply to the defendant's construction. It might, however, desire to use other improvements covered by plaintiff's patents. The licensees provided for the right to use any other patents that the New York corporation should acquire and also created the necessity for acquiring such patents which might be found of advantage to licensees.

Bonsack M. Co. v. Smith, 70 Fed. Rep., 383, 386, 387.

The life of a patent is conceded to be seventeen years. The length of its life cannot be extended by re-issue; a re-issue can only be made to correct errors, and when the re-issue is granted it is for the unexpired term of the original patent and the re-issue cannot be enlarged in its scope. If it is enlarged it is void. It is apparent, therefore, that the term of the license is only for a limited number of years, depending on the life of the patent or patents, which apply to the defendant's licensed harrows. This was a reasonable and proper exercise of contract rights, the contract being based in all of its provisions exactly upon the rights owned by the plaintiff and were not in one instance enlarged.

There is no finding by the referee that any of the patents under which the licenses were granted were invalid. It was found by the referee that the patents were claimed to cover the defendant's construction.

Both the licensor and the licensee had then existing conflicting rights which the contracts settled. The settlement was good.

Marsden v. Sweet, 66 N. Y., 206.

The first clause and the first paragraph of the second clause of the license provided for the payment of a royalty of one dollar for the use of the plaintiff's patents on each harrow. The reasonableness of this royalty has not been questioned. It provided for the making of reports, keeping books, etc., necessities for ascertaining the amount of royalties to be paid.

In the remainder of the first clause and the second clause of the license, it was agreed that the licensee should not sell harrows or harrow frames "to any "person, firm or corporation to be sold on commis- "sion, or allow any rebate or deduction from the "price or prices fixed in this license except to settle "with an insolvent debtor for harrows or harrow "frames or attachments applicable thereto previously "sold or delivered."

This clause was for the benefit of the licensor and the licensee equally; to permit the licensee to ship his goods to all parts of the country to be sold on commission is a vicious system of business; neither party would know the extent of their sales, and aside from this, sales made by jobbing agents can never be controlled and the entire market would become demoralized and the business ruined. This clause was a matter of self-protection to both.

By the third clause, the defendant agreed not to sell "at a less price or on more favorable terms of "payment and delivery to purchasers, than is set "forth in schedule A, made a part of this license ex- "cept as hereinafter provided."

This clause was legal and valid. The New York corporation owned the patents. It had a right to impose any terms it saw fit to those who used its patents. The whole question was strictly in the domain of contract.

Fowle v. Park, 131 U. S., 88.
Duber Watch Case M. Co. v. E. Howard W. & C. Co., 66 Fed. Rep., 637.
Central Shade Roller Co. v. Cushman, 143 Mass., 353, 354.
Gloucester I. & G. Co. v. Russia Cement Co., 154 Mass., 92.
Dolph v. Troy Laundry M. Co., 28 Fed. Rep., 553.
In re Green, 52 Fed. Rep., 104, 115.

It was for the interest of both the licensor and the licensee that uniform prices of all licenses should be maintained. If the market was demoralized, by the cutting of prices, there would be no profit in the business for the manufacturer and no royalties for the licensor. This clause of the agreement rests in the very nature of the patent.

The owner of a valid patent secured under the constitution and the laws of the United States, has three exclusive rights: first, the right to manufacture; second, the right to sell; and third, the right to use, and any one who invades either of these rights is an infringer.

The fourth clause reserves the right to the licensor to "decrease the selling price and make the terms of "payment and delivery more favorable to the pur- "chaser, and reduce the royalty" on licensed harrows, etc.

The licensor has no power to raise the selling price nor the amount of royalty to be paid, nor to make the terms of payment or delivery of harrows or harrow frames less favorable to purchasers. This was a reasonable and proper restraint on the licensor and was advantageous to the licensee.

The provision for labels and the use thereof was a mere matter of detail and was a necessary and proper provision for the protection of the public and every party in interest. The use of such labels is customary where goods are manufactured under patents, and the Federal Statute requires the article to be stamped with the word "patented" and the date of such patent. This clause is also inserted to furnish information to the licensor of the number of labels purchased by the licensee and to determine the number of such sales.

In the sixth clause it was agreed that "the licensees "will not during the continuance of this license, be "directly or indirectly engaged in manufacturing any "other float spring tooth harrow, or float spring "tooth harrow frame without teeth or attachments "applicable thereto than those which it is licensed "to manufacture and market under the terms of this "license, except such as it may manufacture and "furnish another licensee of the National Harrow "Harrow Company, and then only such construction "thereof as such other licensee shall be licensed by

"the National Harrow Company to manufacture and "sell, except such other styles as it may be licensed "to manufacture and sell by the National Harrow "Company."

This was a reasonable provision. Without such a provision, the licensor's business might be ruined by a dishonest licensee changing his construction of harrow to interfere with other licensees, and, by putting such altered harrows upon the market in defiance of the license contract, inflict irreparable injury on other rights. This case is an illustration of the dishonest schemes of licensees to beat the licensor and still obtain all the benefits of his patents. This clause placed no restriction on the defendant who was left free to manufacture or sell spike or peg tooth harrows, disk harrows, riding harrows, or indeed any other kind of harrow, "other than float spring tooth "harrows." It was not only a reasonable, but a lawful and necessary limitation on the licensee resting in the domain of contract.

Bowling v. Taylor, 40 Fed. Rep., 404.
Billings v. Ames, 32 Mo., 265.
Jones v. Lees, 1 Hurlston & Norman's Rep., 186.

This limitation did not stifle invention as contended by the defendant in the Appellate Division. The Federal Statute requires the inventor to make application for United States letters patent. A corporation cannot file an application for a patent, it cannot make an invention, the invention must be made by an intelligent mind and the owner of that intelligent mind who makes an invention is the only person that can make an application for United States letters patent.

The licensees stipulated that "during the term of "this license, it will not directly or indirectly in any "way deny or contest the validity of any of the "patents applicable to and embracing the construc- "tion which it is licensed to manufacture, or that it "may manufacture for another licensee which said "licensee is licensed to manufacture and sell, or the "re-issue thereof, or the sufficiency of the specifica- "tions thereof, or the validity of the title to such let- "ters patent or re-issue, or the right of the National "Harrow to make licenses to others, and no act of "either party shall invalidate this admission."

This is the usual stipulation in licenses, and indeed imposes no more obligation than the law places upon a licensee, who by virtue of his license is not permitted by law to do any of the acts which are embraced in this clause.

The licensor in the ninth clause agrees that "after "such license becomes operative, it will not license "any other person or party to manufacture and sell "any float spring tooth harrows, float spring tooth "harrow frames without teeth or attachments ap- "plicable thereto of the *peculiar style and construc-* "*tion* or embodying the peculiar features thereof" used by the licensee as illustrated and embodied in the sample harrows, then in the possession of the treasurer of the licensor, and referred to in schedule A which is made a part of the licenses.

This was not only a proper restraint on the licensor, as it would be manifestly unfair to license another manufacturer to use a duplicate or such near imitation of the licensee's goods as was calculated to deceive or injure the licensee's trade.

The latter part of the eighth clause and the tenth clause, when read in connection with the licenses and the ninth and other clauses are as follows: "The licen- "see will not alter or change the construction of the float "spring tooth harrow, float spring tooth harrow frames "frames without teeth or attachments applicable there- "to, from that construction appearing in the sam- "ples in the possession of the treasurer of the licensor, "and mentioned in schedule A; and will not manu- "facture or sell or procure to be manufactured or "used directly or indirectly any other or different "styles thereof, except such as it may supply to other "licensees who are licensed to manufacture and sell "the same."

This clause was reasonable and just, and indeed it is the very necessity for a licensor to prevent the licensee from doing irreparable injury to other licensees by adopting and making improvements previously adopted by other licensees. It is a very common provision in a license contract, and up to this case, has never been considered as interfering with any public rights.

The eleventh clause reserved to the licensor the option to treat any departure from the terms of the contract as a breach thereof and the licensee as an infringer, and to restrain the purchase thereof by suit and injunction, the licensee waiving the right of trial by jury, which remedy is provided by the seventh clause.

This and the next clause shows that the licenses are continuing contracts for the full term of the life of the patent or patents used by the defendant, notwithstanding any violation thereof by the licensee, unless

the licensor should elect to terminate them for breaches thereof by the licensee.

The exercise by the licensor of the right to terminate would always be under the control of the court, and must be a reasonable exercise of a power reserved and could not be arbitrarily used. This clause was reasonable and proper.

The twelfth clause provided that the licensor should not be released from the payment of royalties and liquidated damages for harrow and harrow frames manufactured or sold up to the time of such termination in the event of a breach of the contract by the licensee and stipulated that such rights of action would become immediately due and payable.

This clause was reasonable and just in its provisions. Such clauses are in daily use in a great variety of contracts.

In the thirteenth clause the licensor is under obligation to defend any suit for an alleged infringement of the licensed articles manufactured and sold, and to pay the costs or damages recovered therein, provided it received notice of the suit and is allowed to appear and conduct the defense. There does not seem to be anything unfair or illegal in this agreement.

It was further stipulated that no royalties should be paid on goods exported for use in a foreign country.

Without this clause the manufacturer would be required to pay royalty on goods not intended for use in this country. This clause was wholly beneficial to the licensee.

The fifteenth clause made the license non-assigna-

ble except to a successor of the licensee in the same place in business, without the written consent of the licensor.

This was a reasonable provision to prevent abuse and to prevent the licenses from getting into the hands of irresponsible parties.

The royalties and liquidated damages shall not cease to be paid under any circumstances whatever except under the conditions named in the licenses during the continuance thereof.

This clause was reasonable and was equivalent to saying that as long as the licensee used the patents and continued the business during the lifetime of the patents he should continue to pay royalties unless the licensor terminates the same for breaches committed by the licensee. The license was limited to "float "spring tooth harrows, float spring tooth harrow "frames without teeth and attachments applicable "thereto." What constituted a float harrow was established by the proof and found by the referee.

In the seventeenth clause it was stipulated that the place of performance of the contracts should be in the City of Utica, N. Y., and that the same "should "be construed and the rights of the parties thereun- "der determined according to the laws of the State "of New York."

It was reasonable to stipulate the place of performance of the contract. It was equally competent for the parties to stipulate the laws by which the validity of the contract was to be measured and decided as one of the parties was a New York corporation and the other a Michigan corporation. The con-

tracts were executed in New York. These provisions were reasonable and were proper and judicious for the protection of the rights of both parties. The place where a contract is made or where it is to be performed controls.

We submit that the contracts under the most careful scrutiny are reasonable and legal in all of their provisions and are in accord with the findings of the referee.

WHAT THE REFEREE DECIDED.

The Referee on the evidence found:—

First: That the contracts in dispute including those contracts set out in the complaint constituted "an absolute sale by the defendant (plaintiff in error) "to the National Harrow Company of New York of "the U. S. Letters Patent and licenses under the U. "S. Letters Patent . . were founded upon a good, "valuable and adequate consideration moving be- "tween the parties."

Rec. p. 64.

Second: That the sales by the plaintiff in error of its patents and rights under the U. S. Letters Patent, including the contracts attached to the complaint "were intended to and did settle existing controver- "sies with reference to the rights of the National "Harrow Company of New York and the defendant "(plaintiff in error)".

Rec. pp. 64 and 65.

Third : He further decided that the contracts attached to the complaint "were and are good and valid "contracts founded on adequate considerations and "were reasonable in their terms . . imposing no "restraints upon the defendant (plaintiff in error) be- "yond those which the parties had a right from the "nature of the transactions to impose and accept."

Rec. p. 65.

Fourth: He further found that both parties for a period of time performed the stipulations contained in the contracts and that the plaintiff (defendant in error) had performed all of the stipulations and agreements to be performed on its part and was ready, able and willing to perform the requirements of the contracts.

That the defendant (plaintiff in error) after receiving and retaining its full consideration, refused to perform its part of the contracts and without cause or reason abandoned the further performance of the contracts and still retained the price it had received. The Court assessed the damages which had been stipulated in the contracts to be paid for the violation of the terms of the agreements.

Rec pp. 66-67.

Fifth: He further found that all of the contracts in evidence were "legal, valid and binding contracts ". . and that they embraced no illegal restraint "and are not repugnant to any rule of public policy, "as tending to create any trust or any other illegal "combination . . and were intended to be con- "tinuing contracts."

Rec. p. 67.

No federal question was suggested or raised during the progress of the trial of the case before the Referee.

The decision of the case turned upon the question as to whether the contracts in suit were in common law restraint of trade. The trial Court held that they were not.

No motion to dismiss at the end of the plaintiff's proof nor at the close of the evidence was made which raised any federal question.

No federal question was decided at any time by the trial Court.

WHAT THE APPELLATE COURT DECIDED.

The Appellate Court decided that no errors of law were committed by the trial Court in receiving, rejecting or in any ruling made during the progress of the case.

This statement is contained in the order and judgment of the reversal.

Rec. pp. 403-404.

The order and judgment of reversal of the Appellate Court did not reverse the judgment on questions of facts.

On the stipulation entered into between the parties after the case had been argued in the Appellate

Division and before it had been decided, it was agreed that the eight questions heretofore quoted were the only questions which the Appellate Court had the right to consider.

All of those questions (except the 8th) were questions of fact and not of law.

There were no exceptions in the record which justified the Appellate Court in reversing the judgment on questions of law. It so held and is so stated in the order of reversal.

If we are permitted to look into the opinion of the Court to determine upon what question of law the Appellate Court reversed the judgment, it at once appears that the reversal of the judgmet in the minds of the Appellate Court as stated in its opinion was reversed on questions of facts.

The learned judge who delivered the opinion of the majority of the Court stated that they were "of the "opinion that the contracts sought to be enforced are "void as against public policy, because by them it is "sought to control for a long period of years during "the life of the patents the float spring tooth harrows, "and to limit during the same period manufacturers' "licenses by the plaintiff (defendant in error) and by "its predecessor to the production of float spring "tooth harrows described in the licenses and because "the effect of the contracts is to prevent further im-"provements in harrows by the licensee of the plain-"tiff" (defendant in error).

Rec. p. 401.

WHAT THE NEW YORK COURT OF APPEALS DECIDED.

The New York Court of Appeals reversed the judgment of the Appellate Court and affirmed the judgment of the trial court.

The appellant in the Court of Appeals contended that the undisputed evidence in the record show that the various agreements entered into at or about the time the contracts in dispute were made, including the contracts in dispute, constituted undisputed evidence of a combination in restraint of trade, and was therefore void. No federal question was raised in the record or discussed in the opinion of the Court of Appeals in reference to any federal question, so far as the record discloses.

The Court of Appeals held and decided that under the statute and constitution of the State of New York it was deprived of the power to consider any question of fact in that Court and that the record showed no question of law for review.

The Court in deciding this case says :

"In very many cases the Court has been invited "to review judgments where it was apparent that a "mistake had been made in the Order of Reversal, "but it has steadfastly adhered to the command of "the statute and refused to sustain the judgment un- "less it appeared that there was an error of law "upon which the General Term or the Appellate Di- "vision, as the case might be, could have rested its "reversal. Among these cases may be found the "following : Weyer v. Beach (79 N. Y., 409) ; "Davis v. Leopold (87 N. Y., 620) ; Hannigan v. "Allen (127 N. Y., 639) ; Furner v. Seabury (135 N.

"Y., 50); Mack v. Colleran (136 N. Y., 617); Rien-
"deau v. Bullock (147 N. Y., 269); Bomeisler v.
"Forster (154 N. Y., 229); Snyder v. Seaman (157
"N. Y., 449); Petrie v. Hamilton College (158 N.
"Y., 458); People v. Adirondack Ry. Co. (160 N.Y.,
"225) Gannon v. McGuire (160 N. Y., 476); Lan-
"non v. Lynch (160 N. Y., 483); Spellman v.
"Looschen (162 N. Y., 268); Shotwell v. Dixon
"163 N. Y., 43)."

This case in the New York Court of Appeals turned wholly on the interpretation of Section 1338 of the Code of Civil Procedure and upon Article VI, Section 9 of the New York State Constitution of 1895 referred to in point on motion to dismiss.

No federal question was before the New York Court of Appeals for its decision, and its decision affected no federal question.

By examining Section 1338 of the New York Code of Civil Procedure and Article VI, Section 9 of the New York State Constitution, both prohibit the Court from passing on any questions except questions of law, and questions of law having been stipulated by the agreement of the parties out of the record there was nothing upon which the judgment of the Appellate Division rested, and the Court of Appeals were compelled to reverse the judgment.

National Harrow Co. v. E. Bement & Sons. (163 N. Y. 505.)

POINT I.

The fact that the contracts in dispute related to United States Letters Patent, does not raise a federal question.

Hartell v. Tilgham, 99 U. S., 547.
Dale v. Hyatt, 125 U. S., 46, 54.

Where two or more questions are raised by answer in a case, and one of the questions being a common law question and the other a federal question and the case is decided on the common law ground, which does not include the federal question, a writ of error to review a judgment of the highest court of the state will not lie.

Gibson v. Chouteau, 8 Wall., 314, 318.
Klinger v. State of Mo., 13 Wall., 257, 263.

In determining whether or not a federal question was raised or decided, this court will not examine or resort to the opinion of the Court to determine this question, nor will it take the assertions of counsel. The record must affirmatively show that a federal question was distinctly raised and decided adverse to the plaintiff in error to justify this Court in reviewing the record.

Gibson v. Chouteau, 8 Wall., 314-318.

A claim growing out of a sale or contracts relating to United States Letters Patent does not present a federal question capable of review in this Court.

Wade v. Lawder, 165 U. S., 624.

A Federal question incidentally plead in an answer setting up other and distinct grounds of defense, where the Federal question was not otherwise raised in the trial Court or on appeal and where the decision upon

its face proceeded upon common law grounds not affecting any Federal right, this court is without jurisdiction to review the judgment of the State Court on a writ of error.

Bacon v. Texas, 163 U. S., 207.
Missouri V. R. R. Co. v. Fitzgerald, 160 U. S., 556.
Chemical National Bank v. City Bank, 160 U. S., 646.

The assignment of error cannot be used to import into the case a Federal question where the record shows that no Federal question was considered or decided by the State Court.

Cornell v. Green, 163 U. S., 75.

The facts and the decision of the referee were amply broad to have justified him in holding and deciding that the contracts were valid and that they were not in common law restraint of trade.

There is no finding in the record which would justify this court in holding that any Federal question was properly raised at any stage of the case in the State Courts.

The record shows ample facts to justify the judgment in the State Courts.

Egan v Hart, 165 U. S., 188.

This case holds that where the findings of the court do not show a Federal question, that it is not the province of this court to find facts which would raise a Federal question, but that the findings of the trial Court were conclusive in this court.

POINT II.

The Sherman-inter-state commerce act has no reference to anything appearing in the record which is sought to be reviewed by the writ of error in this case.

The power of Congress to regulate, under the constitution, commerce between the States is an exclusive power delegated to the Federal Government, whose right is exclusive.

Gibson v. Ogden, 9 Wheat. 1.

This Court has decided that where no regulation by Congress, touching inter-state commerce exists, then necessarily commerce between the States is free.

The power of Congress to establish by legislation, regulations, effecting commerce between the States is confined strictly to commerce which begins in one state and terminates in another.

The Sherman anti-trust law, so called, by its expressed terms, is limited to contracts which affect commerce between the States and between foreign nations.

This Court held in the Trans-Mississippi freight case, arising out of agreements made between Trunk Line railroads with reference to freight rates that the statute applied equally to contracts which had prior to the act been held to be reasonable, as well as to contracts, which under the law, would be held illegal, so that a question of whether a given contract effecting inter-state commerce is legal or illegal when measured by common law rules effecting restraint of trade, are both equally condemned under the provisions of this act.

The act of Congress, declares "every contract, "combination in the form of a trust or otherwise, or "conspiracy in restraint of trade or commerce "among the several States" to be "illegal."

Chap. 647, Laws of 1890, Sec. 1.

This statute provides three distinct remedies for violations of the provisions of Section 1 of the act:

First: It prescribes a criminal penalty for a violation of the law.

Second: It provides a civil remedy in the Circuit Court of the United States in equity in a suit brought by the local United States Attorney by and with the advice and consent of the Attorney General of the United States the statute grants ample equitable power in such a suit to restrain by injunction (Sec. 4).

Third: The act gives to the party aggrieved, a civil remedy in any Circuit Court of the United States without reference to the amount involved and such an action is triable by jury and the plaintiff is authorized to recover and include his attorney's costs and the Court is required to thribble the damages (Sec. 7).

This statute created a new right of action with reference to inter-state commerce and specifically provided remedies for violations of the statute.

It is a familiar rule of interpretation of statutes that where new rights and duties are created by statute and new remedies are granted, the remedies prescribed are in their very nature exclusive.

Endlich on Interpretation of Statutes (1888) 216, Sec. 154, and cases cited.

This statute was never intended, nor can it be extended by interpretation to contracts between private individuals in suits brought in State Courts.

The trial Court in this case found and decided that a part of the contracts in the suit had for their purpose and object the sale and transfer of U. S. Letters Patent and rights growing out of such patents and that contracts A and B were license contracts under U. S. Letters Patent. That all said documents had for their purpose and object the settlement as between private parties of strenuous and expensive patent lawsuits, which were by the papers in dispute settled and discontinued.

A patent is not an article of inter-state commerce.

The license to use U. S. Letters Patent does not necessarily affect inter-state commerce.

Articles manufactured under U. S. Letters Patent and shipped from one state into another may constitute commerce between the states.

The purchase from various private parties of U. S. Letter Patents by the assignor of the defendant in error, even though such purchase extended to the ownership of the entire art in relation to spring tooth harrows and the granting of licenses to those who might wish to use those patents, does not constitute contracts having for their purpose the interference with inter-state commerce, which could not possibly arise until such time as those who were licensed to use the invention had produced the articles contemplated and shipped them from one state into another state as articles of inter-state commerce.

The defendant in error contends that the rule decided by this Court in the case of the United States vs. E. C. Knight Co. (156 U. S. 1), is controlling with reference to the facts disclosed in this case.

This was a suit in equity in the State Court between private parties.

The inter-state commerce act does not contemplate or permit a question with reference to inter-state commerce to be litigated or decided in a suit in equity in a state Court between private parties.

The state Court had no jurisdiction in such a suit to either consider or pass upon the question of whether the contracts were prohibited by the act of Congress.

That can only be done in the Circuit Court of the United States either in a suit in equity where the United States is plaintiff, or in a suit at law where the aggrieved party is plaintiff against the party who has committed the wrong. It was never contemplated that this act could be construed or interpreted by any State Court, or that the act could be made available to defeat a private contract between parties in a State Court.

In re Greene (52 Fed. Rep. 104) Judge Jackson, in substance decided that Congress had no authority under the commercial clause or any other provision of the constitution to limit the right of the corporations created by State law from acquiring, purchasing and holding and disposing of property in several states, even where the property might become inter-state commerce and the learned Judge further held that it was not the intention of the anti-trust laws, so called, to make illegal the acquisition of property

by State corporations, even though such acquisition might control the entire traffic of the country in that particular subject.

It has been repeatedly adjudged by the Circuit Court and Circuit Court of Appeals that the anti-trust law gave no color or authority to a State Court or even a Federal Court to determine the validity or effect of contracts which might or might not affect inter-state commerce, unless those questions were raised in a suit in equity wherein the United States was plaintiff or in the Circuit Court of the United States where the aggreived party was plaintiff; that these civil remedies were exclusive and must be applied in suits authorized by the act and in no other way.

Pidcock v. Harrington, 64 Fed. Rep. 821.
Southern Ind. Ex. Co. v. U. S. Exp. Co. 88 Fed. Rep. 659 (affirmed in '92 Fed. Rep. 1032.)
Gulf C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. Rep. 407.
Metcalf v. American S. F. Co., 108 Fed. Rep. 909.
Endlich on Intrepretation of Statutes (1888) 216, Sec. 154 and cases cited.

Had the plaintiff in error when sued in equity in the state court on its contracts, interposed as its sole ground of defense, that the contracts in dispute, had for their purpose and object the control and restraint of commerce between the states, and this fact had been found by the trial Court and it had been the only ground upon which the judgment of the N. Y. Court of Appeals rested, it would present to this Court no Federal question capable of review in this

Court for the obvious reason, that the suit was not one authorized by the act of Congress nor was it competent to plead the statute in a private suit thus brought and the consideration of the question by the State Court would have been as it is now utterly without jurisdiction to pass upon that question.

Had Congress intended to put it within the power of a defendant when sued in a State Court on a contract to interpose such a defense such legislation would have been unconstitutional because Congress is confined in its power to legislate to commerce between the states and with foreign nations.

It is idle to contend, we think, that the State Court in a private suit in equity had any power or right whatever, to pass upon the question whether or not the contracts were repugnant to the act. The State Court in fact never did pass on the effect of this statute on the contracts.

(*a.*) In the Trans-Missouri Joint-Traffic Association and the Addyston Pipe Company cases, this Court in substance held that the Sherman anti-trust laws applied to contracts and agreements relating exclusively to inter-state commerce and did not apply to contracts which might or might not incidentally, remotely or collaterally affect inter-state commerce. The act does not, therefore, apply to combinations of interest and property by those engaged in a kindred line of business through the formations of corporations or the employment of the same selling agents or by the sale or combination of sales to a single corporation; and contracts binding those who make the sales from not directly or indirectly engaging in the same business, that to all such agreements, they were

and are collateral to and refer remotely, if at all, to what may or may not afterwards become an article of inter-state commerce and as to such contracts the law does not apply.

The contracts in suit, did not and could not directly affect inter-state commerce, the most that can be said with reference to them is, that they place restraints upon these who took licenses under the patents and become manufacturers of the patented articles, which after their manufacture might or might not become the subject of inter-state commerce.

It was never the intention of Congress in the passage of the Sherman anti-trust law that it should apply to or control private business transactions where the direct effect of the contracts did not necessarily have for their object or purpose, the interfering with articles of inter-state commerce.

The interpretation contended for by the defendant in error, is sustained by this Court in the case of the State of Minnesota v. The Northern Security Company, a decision handed down February 24th, 1902.

POINT III.

The record in this case contains the evidence and proceedings had in the State Court.

In order to inject into this case an alleged Federal question, it is necessary that this Court should examine the evidence and find contrary to the trial Court that the anti-trust-law of the United States was violated in making and carrying into effect, the various agreements contained in the record.

The State Court found and decided as a matter of fact, that the various contracts did not involve any combination, trust or other monopolies, but were reasonable and just contracts, such as the parties had the right to make.

This finding cannot be overthrown.

In Egan v. Hart (165 U. S., 188-194) this Court says :

"The record before us contains all the testimony "introduced and evidence offered in the trial Court, "all of which was open for consideration and passed "upon by the Supreme Court of the State of Louisi- "ana. On error, however, to a State Court, this "Court cannot re-examine the evidence, and when "the facts are found below, this Court is concluded "by such findings. Dower v. Richards, 151 U. S., "658 ; Bartlett v. Lockwood, 160 U. S., 357 ; Stanley "v. Schwalby, 162 U. S., 255. True it is that in Dower "v. Richards the Court, referring to the dictum in Re- "publican River Bridge Co. v. Kansas P. R. Co. (92 "U. S., 315-317) treated as open for further consider- "ation the question whether in Chancery cases, power "resided in this Court to review the decision of the "State Court on both the law and fact.

"We however, conclude that not only the very na- "ture of the writ of error, but also the rulings of this "Court from beginning, make it clear that on error to a "State Court in a Chancery case as in a case had at "law, where the facts are found by the Court below, "this Court is concluded by such finding. The adjudi- "cations are collected very fully in Dower v. Richards "and in the subsequent cases above referred to."

In this case the Court further held that it was com-

petent for this Court to examine the opinion in the Court below for the purpose, not of deciding the facts, but by way of throwing light on the findings and looking into the entire record.

Crossley v. New Orleans, 108 U. S. 105.
Gross v. U. S. Mortgage, 108 U. S. 477.

POINT IV.

The decision of the New York Court of Appeals in this case, turns wholly on the interpretation of Section 1338 of the N. Y. Code of Civil Procedure and Section 9 of Article VI of the State Constitution.

The Court held that the findings of fact by the trial Court must be accepted in that Court as verities, and that all exceptions that raised questions of law, based on the findings of fact were out of the case and that the record showed no errors of law committed by the trial Court, which the Appellate Court had the right to consider, and therefore the judgment of the Appellate Court was reversed because no errors of law were found, and the judgment of the trial Court was affirmed.

The decision of the N. Y. Court of Appeals on the interpretations of the statutes and constitution of that State, are conclusive on this Court.

POINT V.

Freedom to make and enforce private contracts is guaranteed to every citizen of the United States;

this doctrine is a universal right ; indeed it is the very basis of civilization of a free people, and the word "Liberty" does not mean merely freedom from personal restraint, but by the interpretation of this court it has been extended to the protection for every lawful purpose in which a citizen may choose to embark.

The term "public policy" is frequently used in a very nebulus sense by the Courts and Judges. When resolved to its primary elements, there can be no such thing as public policy of a state or a nation, except as is prescribed by its legislation and by the decision of its courts.

People v. Hawkins, 157 N. Y., 1.

Has the United States any rule of public policy except as relates exclusively to an article of interstate or foreign commerce?

The owner of a patent does not hold his patent upon the condition that he shall make or vend the articles patented or allow others to do so for a reasonable compensation.

He may, if he chooses, remain absolutely quiet, and not only neglect and refuse to make the patented article, but he may likewise refuse to permit any one else to do so on any terms.

He may impose any terms within the domain of contract as a condition to the right to manufacture or use his invention. How far he may go is within his own power, which cannot be interfered with by the courts.

Having patented rights, the owner may plainly be permitted to make any agreement that does not affect

public morals which he chooses, with reference to their use.

It is idle, we contend for the plaintiff in error to assail the validity of the contracts, the purpose of which assault is to permit the plaintiff in error to keep the large consideration received and to repudiate the performance of the stipulations which it agreed to perform.

Good v. Daland, 121 N. Y., 1, 9.
Hobbie v. Jennison, 149 U. S., 353-363.
Morse Twist Drill & M. Co. v. Morse, 103 Mass., 76.
Central S. R. Co. v. Cushman, 143 Mass., 353.
Hules v. Bonsack M. Co., 65 Fed. Rep., 864.
Bonsack M. Co. v. Smith, 70 Fed. Rep., 383.

(*a.*) If there is any public policy with reference to the rights of an owner of one or more United States Letters Patents, it permits him to make such contracts with reference to their use as he may see fit, and it does not lie with the Courts to interfere with such contracts so long as they are based upon the patents and are the rights flowing therefrom.

The constitution does not attempt to give an individual or a series of individuals, a right to their respective inventions, nor does it grant an author the right to his composition ; it does, however, recognize an original pre-existing, inherent right of property in the invention and authorizes Congress to secure to authors and investors, the enjoyment of those rights, but the right existed before the constitution and above

the constitution, and is a natural right, more than that which any man can assert in almost any other kind of property.

The production of one's mind is confessedly as really property as the fabric of one's hands; indeed they are much more exclusive. The patent is a contract by which the inventor conveys to the commonwealth forever his invention in consideration of the exclusive right of the invention for a limited period.

The very nature of the rights under Letters Patent is that ownership.

LASTLY.

The writ of error should be dismissed or the judgment should be affirmed with cost.

February 25, 1902.

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